

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TIMOTHY BRIGGS,)	
)	No. CV-06-0081-MWL
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on September 18, 2006. (Ct. Rec. 9, 12). Plaintiff Timothy Briggs ("Plaintiff") filed a reply on September 8, 2006. (Ct. Rec. 14). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Carol A. Hoch represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 12) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 9).

JURISDICTION

On December 20, 2002, Plaintiff's father, Randy Briggs, filed an application for Child's Insurance Benefits (AR 82-84). On December 31, 2002, Randy Briggs filed an application on his son's behalf for Supplemental Security Income ("SSI"), alleging disability since birth due to anger problems. (Administrative Record ("AR") 521-523). The applications were denied initially and on reconsideration. Plaintiff's request for a hearing was untimely filed, but the Administrative Law Judge ("ALJ") found that plaintiff established good cause for the late filing. (AR 22).

On December 2, 2004, Plaintiff appeared before ALJ Mary B. Reed, at which time testimony was taken from plaintiff, plaintiff's father, medical expert Allen Bostwick, Ph.D., and vocational expert Daniel McKinney. (AR 534-586). On May 19, 2005, the ALJ issued a decision finding that plaintiff was not disabled. (AR 19-32). The Appeals Council denied a request for review on January 20, 2006. (AR 8-10). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g). (Ct. Rec. 1).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both plaintiff and the Commissioner and will only be summarized here. Plaintiff was 24 years old on the date of the hearing. (AR 23).

At the administrative hearing held on December 2, 2004,

1 plaintiff testified that on occasion he worked approximately once
2 per month with his uncle cleaning houses after people moved out.
3 (AR 544). During the previous summer he worked with his father
4 from 2 to 4 hours a day returning grocery shopping carts. (AR 545-
5 546). Plaintiff testified that a couple of weeks prior to the
6 hearing, he had applied for a telemarketing job but was not hired.
7 (AR 551). He was on a waiting list with the Department of
8 Vocational Rehabilitation. (AR 551-552). Plaintiff testified, "I
9 can work. It's just I'm having problems finding work." (AR 552).
10 Plaintiff testified that he had not been slamming walls and had
11 not started anything violent recently: "probably a long time ago
12 when I was in school." (AR 554-555). Plaintiff testified that he
13 has friends, and they play video games and pool. (AR 556). He
14 admitted that sometimes he yells at his father, and had hit his
15 father after his father hit him. (AR 557). Plaintiff said that his
16 physician told him not to lift more than 50 pounds. (AR 557).

17 Plaintiff's father and nonlawyer representative, Randy
18 Briggs, testified that two years earlier plaintiff violently
19 destroyed property, and within the last year destroyed a stove by
20 breaking off the oven door. (AR 558). In the past plaintiff threw
21 a lawn mower that would not start. (AR 558-559). When not taking
22 Prozac, "his attitude is just totally really destructive." (AR
23 560). Additional lay testimony was presented in the form of
24 letters by his father's girlfriend, also referred to in the record
25 as plaintiff's stepmother, ValaRae VanCamp (AR 169-170, 309);
26 plaintiff's mother, Carol Briggs, (AR 175-176, 199-210); family
27 friend Ginger Joy (AR 195-196); plaintiff's older brother Dale (AR
28 217, 308); plaintiff's father (AR 222, 311-313); neighbor April

1 Parker (AR 247-254); family friend Donna Buck (AR 255-260);
2 acquaintance Alvin Roger (AR 314), and plaintiff's younger brother
3 Benjamin. (AR 315-316).

4 Medical expert Allen Bostwick, Ph.D., and vocational expert
5 Daniel McKinney testified at the administrative hearing held on
6 December 2, 2004. (AR 563-576; 577-582).

7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the "Act") defines "disability" as
9 the "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental impairment
11 which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than
13 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
14 Act also provides that a Plaintiff shall be determined to be under
15 a disability only if his impairments are of such severity that
16 Plaintiff is not only unable to do his previous work but cannot,
17 considering Plaintiff's age, education and work experiences,
18 engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
20 Thus, the definition of disability consists of both medical and
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
22 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled.
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
26 engaged in substantial gainful activities. If he is, benefits are
27 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If he
28 is not, the decision maker proceeds to step two, which determines

1 whether Plaintiff has a medically severe impairment or combination
2 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
3 416.920(a)(4)(ii).

4 If plaintiff does not have a severe impairment or combination
5 of impairments, the disability claim is denied. If the impairment
6 is severe, the evaluation proceeds to the third step, which
7 compares plaintiff's impairment with a number of listed
8 impairments acknowledged by the Commissioner to be so severe as to
9 preclude substantial gainful activity. 20 C.F.R. §§
10 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
11 App. 1. If the impairment meets or equals one of the listed
12 impairments, plaintiff is conclusively presumed to be disabled.
13 If the impairment is not one conclusively presumed to be
14 disabling, the evaluation proceeds to the fourth step, which
15 determines whether the impairment prevents plaintiff from
16 performing work he has performed in the past. If plaintiff is
17 able to perform his previous work, he is not disabled. 20 C.F.R.
18 §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step,
19 plaintiff's residual functional capacity ("RFC") assessment is
20 considered. If plaintiff cannot perform this work, the fifth and
21 final step in the process determines whether plaintiff is able to
22 perform other work in the national economy in view of his residual
23 functional capacity and his age, education and past work
24 experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
25 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

26 The initial burden of proof rests upon plaintiff to establish
27 a *prima facie* case of entitlement to disability benefits.
28 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

1 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
2 met once plaintiff establishes that a physical or mental
3 impairment prevents him from engaging in his previous occupation.
4 The burden then shifts, at step five, to the Commissioner to show
5 that (1) plaintiff can perform other substantial gainful activity
6 and (2) a "significant number of jobs exist in the national
7 economy" which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d
8 1496, 1498 (9th Cir. 1984).

9 With regard to the application for Childhood Disability
10 Benefits, additional issues are whether the claimant is the child
11 of the wage earner, is unmarried (unless one of the exceptions in
12 20 C.F.R. § 404.352(b)(2) applies), has established he was
13 dependent on the wage earner, and is under a disability that began
14 before the claimant reached age 22, and persisted thereafter to
15 within twelve months of the application. 42 U.S.C. §§ 402(d),
16 423(d), 20 C.F.R. §§ 404.350, 404.351(b). The standard of
17 disability is the same for an adult disabled child as it is for a
18 wage earner. 20 C.F.R. §§ 404.1505 et seq.

19 STANDARD OF REVIEW

20 Congress has provided a limited scope of judicial review of a
21 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
22 the Commissioner's decision, made through an ALJ, when the
23 determination is not based on legal error and is supported by
24 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
25 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
26 1999). "The [Commissioner's] determination that a plaintiff is
27 not disabled will be upheld if the findings of fact are supported
28 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572

1 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
2 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
3 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
4 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
5 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
6 573, 576 (9th Cir. 1988). Substantial evidence "means such
7 evidence as a reasonable mind might accept as adequate to support
8 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
9 (citations omitted). "[S]uch inferences and conclusions as the
10 [Commissioner] may reasonably draw from the evidence" will also be
11 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
12 On review, the Court considers the record as a whole, not just the
13 evidence supporting the decision of the Commissioner. *Weetman v.*
14 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
15 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

16 It is the role of the trier of fact, not this Court, to
17 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
18 evidence supports more than one rational interpretation, the Court
19 may not substitute its judgment for that of the Commissioner.
20 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
21 (9th Cir. 1984). Nevertheless, a decision supported by
22 substantial evidence will still be set aside if the proper legal
23 standards were not applied in weighing the evidence and making the
24 decision. *Browner v. Secretary of Health and Human Services*, 839
25 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
26 evidence to support the administrative findings, or if there is
27 conflicting evidence that will support a finding of either
28 disability or nondisability, the finding of the Commissioner is

1 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
2 1987).

3 **ALJ'S FINDINGS**

4 At the outset the ALJ found that plaintiff meets all of the
5 threshold requirements for Childhood Disability Benefits. 42
6 U.S.C. §§ 402(d), 423(d); 20 C.F.R. § 404.351(b). (AR 23).

7 The ALJ found at step one that plaintiff has not engaged in
8 substantial gainful activity since the alleged onset date, his
9 date of birth, November 3, 1980. (AR 23). At step two, the ALJ
10 determined that Plaintiff suffers from severe mental impairments
11 and scoliosis. (AR 27). The ALJ found that plaintiff does not
12 have an impairment or combination of impairments listed in or
13 medically equal to one of the listed impairments. (AR 27).

14 The ALJ concluded that plaintiff has the RFC to perform work
15 at the medium level of exertion, meaning that he is able to lift
16 no more than 25 pounds frequently or 50 pounds occasionally. He is
17 moderately limited in his ability to understand, remember and
18 carry out written detailed instructions, and slightly limited in
19 his ability to accept instructions and respond appropriately to
20 criticism from supervisors. (AR 30). Plaintiff is also limited in
21 that, while he has a high school education, his reading skills are
22 at the 6th grade level, and his math and language skills are at
23 the 4th grade level. (AR 27, 32). At step four of the sequential
24 evaluation process, the ALJ found that plaintiff has no past
25 relevant work. (AR 30). At step five the ALJ relied on the
26 testimony of vocational expert Daniel McKinnney and determined
27 that because there are jobs plaintiff can perform that exist in
28 significant numbers both regionally and nationally, plaintiff was

1 not disabled within the meaning of the Social Security Act and was
2 thus not entitled to childhood disability or to SSI benefits. (AR
3 31).

4 ISSUES

5 Plaintiff contends that the ALJ erred as a matter of law.
6 Specifically, he argues that:

7 1. The ALJ erred by relying on the testimony of the medical
8 expert in assessing plaintiff's limitations;

9 2. The ALJ erred by failing to properly credit the opinions
10 of Dr. Bailey, Dr. Beaty, and Dr. Kester; and

11 3. The ALJ erred by failing to provide germane reasons for
12 rejecting the opinions of the lay witnesses.

13 (Ct. Rec. 10, pp. 8-15).

14 This court must uphold the ALJ's determination that plaintiff
15 is not disabled if the ALJ applied the proper legal standards and
16 there is substantial evidence in the record as a whole to support
17 the decision.

18 DISCUSSION

19 **A. Weighing the Medical Expert's Testimony**

20 Plaintiff contends that the ALJ erred by placing too much
21 weight on the opinion of the testifying medical expert, Allen
22 Bostwick. (Ct. Rec. 10, pp. 8-13). The Commissioner responds that
23 the ALJ properly weighed Dr. Bostwick's opinion along with the
24 other medical evidence when assessing plaintiff's RFC. (Ct. Rec.
25 13, pp. 6-14).

26 The ALJ found that the record reflects that plaintiff suffers
27 from the severe impairments of scoliosis and mental impairments.
28 (AR 27). The ALJ observed Dr. Bostwick's testimony that plaintiff

1 had a history of angry outbursts, generally associated with
2 relatives and close associates. The record did not disclose
3 evidence of difficulties with peers or authority figures.
4 Plaintiff also had a history of learning disorders in math and the
5 written word. (AR 27). The ALJ notes that Dr. Bostwick diagnosed
6 plaintiff with a mild personality disorder with an intermittent
7 explosive disorder. (AR 27).

8 The ALJ pointed out Dr. Bostwick's testimony that plaintiff
9 participated in counseling in anger management and was able to
10 have self-control upon discharge. (AR 27). The ALJ noted Dr.
11 Bostwick's opinion that plaintiff's diagnosis of borderline
12 intellectual functioning was based on inconsistent scores on
13 intelligence tests. The ALJ found that clinical examination,
14 plaintiff's demonstrated functioning, and recent test results do
15 not support a diagnosis of borderline intellectual functioning.
16 (AR 27). The ALJ observed that Dr. Bostwick opined that
17 plaintiff's mental impairments result in a mild restriction of
18 activities of daily living (due to difficulty with reading and
19 math), mild difficulties in maintaining social functioning
20 (impulsivity, increased with family members, but alleviated with
21 Prozac), mild deficiencies of concentration, persistence or pace,
22 and no episodes of decompensation of extended duration. (AR 27).
23 The ALJ observed Dr. Bostwick's opinion that plaintiff was
24 moderately limited in his ability accept instructions and respond
25 appropriately to criticism from supervisors. (AR 27).

26 The Ninth Circuit has held that "[t]he opinion of a
27 nonexamining physician cannot by itself constitute substantial
28 evidence that justifies the rejection of the opinion of either an

1 examining physician or a treating physician." *Lester v. Chater*,
2 81 F.3d 821, 830 (9th Cir. 1996). Rather, an ALJ's decision to
3 reject the opinion of a treating or examining physician, may be
4 based in part on the testimony of a nonexamining medical advisor.
5 *Magallanes*, 881 F.2d at 751-55; *Andrews v. Shalala*, 53 F.3d 1035,
6 1043 (9th Cir. 1995). The ALJ must also have other evidence to
7 support the decision such as laboratory test results, contrary
8 reports from examining physicians, and testimony from the claimant
9 that was inconsistent with the physician's opinion. *Magallanes*,
10 881 F.2d at 751-52; *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ
11 may reject the testimony of an examining, but nontreating
12 physician, in favor of a nonexamining, nontreating physician only
13 when he gives specific, legitimate reasons for doing so, and those
14 reasons are supported by substantial record evidence. *Roberts v.*
15 *Shalala*, 66 F.3d 179, 184 (9th Cir. 1995).

16 The ALJ thoroughly summarized the record in detail (AR 24-30)
17 and, as noted by the Commissioner, found that Dr. Bostwick's
18 opinion was consistent with the opinions of examining Drs. Lauby
19 and Toews. (AR 29).

20 Gary Lauby, Ph.D., examined plaintiff on May 1, 2000. (AR
21 333-338). Plaintiff told Dr. Lauby he achieved significant gains
22 from counseling at Spokane Mental Health. (AR 333). The ALJ notes
23 Dr. Lauby's observation that the information did not suggest that
24 the plaintiff experienced any difficulties with concentration or
25 persistence, his social interaction was appropriate and his
26 adaptation in the community was fair. No limitations in the
27 ability to learn, reason, understand and remember were noted. (AR
28 29)(citing Exhibit 3F which is AR 333-338).

1 Jay Toews, Ed.D. evaluated plaintiff on October 30, 2001. (AR
2 363). Plaintiff told Dr. Toews he has anger problems but he denied
3 becoming assaultive. (AR 363). The ALJ noted Dr. Toews' opinion
4 that plaintiff is capable of remembering multi-step instructions,
5 relating to supervisors and co-workers, getting along with the
6 general public, and persisting and maintaining pace. (AR
7 29)(citing Exhibit 5F which is AR 363-366).

8 Dr. Bostwick's assessed limitations are greater than those
9 assessed by either of the examining physicians Dr. Lauby or Dr.
10 Toews. For example, the ALJ adopted Dr. Bostwick's opinion that
11 plaintiff's mental impairments result in a mild restriction of
12 activities of daily living, mild difficulties in maintaining
13 social functioning, mild deficiencies of concentration,
14 persistence or pace, and moderate limitations in the ability to
15 accept instructions and respond appropriately to criticism from
16 supervisors (AR 27); whereas Dr. Lauby assessed plaintiff as able
17 to learn and complete projects such as generously-timed assembly
18 line projects on a level of success competitive with his peers.
19 (AR 338). Dr. Toews opined that plaintiff is able to get along
20 with the general public, that his attention and concentration are
21 normal, that his persistence and pace are not limited, and that
22 plaintiff is a good candidate for DVR. (AR 366). The limitations
23 assessed by the testifying medical expert are greater than those
24 assessed by two examining physicians. Plaintiff's contention that
25 the ALJ erred by adopting the opinion of the testifying medical
26 expert to the exclusion of the other evidence is not supported by
27 the record.

28

B. Weighing Opinions of Drs. Bailey, Beaty and Kester

Plaintiff contends that the ALJ improperly rejected the opinions of James Bailey, Ph.D, Howard Beaty, Ph.D., and Gene Kester, M.D. (Ct. Rec. 10, p. 12-13). The Commissioner responds that the ALJ appropriately weighed all of the medical evidence. (Ct. Rec. 13, p. 11-14).

In a report dated February 17, 2003, Dr. Bailey opined that plaintiff was independent in his activities of daily living, but was "probably limited [socially] from public contact . . ." The ALJ notes Dr. Bailey's suggestion that the plaintiff was "likely able to do some nonacademic, more simple tasks at a slower pace." (AR 29). The ALJ rejects the limitation on public contact because, as she correctly points out, plaintiff's angry outbursts are directed more toward family and friends than the general public, and there is nothing in the record to support the limitation. (AR 29). Although not given as a reason for discounting Dr. Bailey's opinion, the ALJ additionally noted that Dr. Bailey's examination was undertaken to determine plaintiff's eligibility for public assistance, whereas those of Drs. Lauby and Toews were not. (AR 27). Similarly, evidence in the record supports Dr. Bostwick's, rather than Dr. Bailey's, limitation with respect to pace. The ALJ rejected the limitations assessed by Dr. Bailey because they are not supported by the record and are inconsistent with the opinions of other examining physicians Dr. Toews and Dr. Lauby. The ALJ is not required to credit unfounded medical opinions.

With respect to the opinions of Drs. Beaty and Kester, the Commissioner notes that they are both State agency consultants and non-examining sources who completed a psychiatric review technique

1 form (PTRF) before all of the evidence had been submitted. (Ct.
2 Rec. 13, pp. 11-13). The Commissioner notes that treatment
3 records, a psychological report by Frank Rosekrans, Ph.D., and the
4 testimony of plaintiff and his father were all considered by Dr.
5 Bostwick but not by Drs. Beaty and Kester. (Ct. Rec. 13, p. 11-
6 12).

7 The ALJ rejected the opinions of Drs. Beaty and Kester
8 noting: "the assessment of the non-examining state agency medical
9 consultants is internally inconsistent." (AR 29). The
10 inconsistency found by the ALJ is that while both doctors
11 recommended that plaintiff work relatively alone, with only
12 superficial interactions with co-workers and the general public,
13 they also note plaintiff's angry outbursts are directed at family
14 and friends rather than the general public. (AR 420). The ALJ
15 observed that these assessments are not consistent with the other
16 evidence and the functional restrictions are not explained (AR
17 29-30).

18 The record supports the ALJ's finding that plaintiff is not
19 limited in his ability to generally interact with the public.
20 Plaintiff plays basketball, pool and video games with friends. (AR
21 337, 556). Plaintiff has lots of friends. (AR 343). Plaintiff
22 reports no generalized difficulty getting along with people, has
23 good relationships with his peers and is able to work. (AR 363-
24 364). Plaintiff completed court-ordered community service hours by
25 picking up litter with a work crew. He had no problems with his
26 co-workers. (AR 555-556). The record fully supports the ALJ's
27 rejection of the limitations assessed by non-examining agency
28 physicians Beaty and Kester in favor of those based on the

1 opinions of Drs. Bostwick, Lauby and Toews.

2 **C. Weighing Lay Testimony**

3 Plaintiff contends that the ALJ failed to properly credit the
4 lay testimony. (Ct. Rec. 10, pp. 13-15). The Commissioner
5 responds that the ALJ discussed many of the statements by lay
6 witnesses and "concluded that the lay witness statements and
7 testimony were consistent with the evidence of record, the
8 testimony of the medical expert, and with [her] findings." (Ct.
9 Rec. 13, p. 14).

10 The ALJ summarized much of the lay testimony, which she
11 credited, as establishing that plaintiff had a history of temper
12 outbursts, usually directed at his father and his father's
13 girlfriend; a history of throwing and slamming things in his home,
14 and punching holes in the walls of his home. (AR 28-29). The ALJ
15 observed that the statements of friends and neighbors established
16 that plaintiff's behavior with them was appropriate and
17 nonviolent, and that the displays of temper they saw were limited
18 mainly to plaintiff's family members. (AR 29).

19 Specifically, the ALJ cited plaintiff's father's testimony
20 that two years earlier, when angry, plaintiff broke a couple of
21 windows when cleaning a house. (AR 28). Several times he destroyed
22 things. In early 2004, plaintiff tried to help his uncle mow
23 lawns, but he threw a lawn mower. Plaintiff's father testified
24 that plaintiff was angry at his uncle's friend who jumped on him
25 in April. He fights with his brothers. Plaintiff's father
26 testified that when his son is off of Prozac,¹ he is very

27
28 ¹ The record reflects that plaintiff does well when on his medications.
(AR 289, 416, 417, 442, 451).

1 destructive. With respect to the letters by plaintiff's mother,
2 plaintiff's father testified that she has problems overstating
3 things. (AR 28).

4 The ALJ cited the statement of plaintiff's older brother Dale
5 that plaintiff experiences mood swings and temper flares, and when
6 not on medication, plaintiff is violent with things. (AR 28)
7 (citing AR 308). The ALJ cited the statement of plaintiff's
8 younger brother Benjamin that plaintiff has a bad temper and had
9 thrown him during a fight. Plaintiff threw things when angry. He
10 was immature. However, the ALJ notes, this witness also stated he
11 believed that plaintiff would be able to maintain employment, "but
12 he just doesn't have the motivation to." (AR 28)(citing Exhibit
13 34E which is AR 315-316).

14 The ALJ cited the statement from Alvin Roger, who
15 occasionally worked with the plaintiff, that plaintiff would quit
16 working after 30 minutes saying it was too hard and boring and
17 that he was tired. (AR 28)(citing Exhibit 33E which is AR 314).
18 The ALJ cited the statement from neighbor April Parker that in the
19 past plaintiff had memory problems. She had read his homework to
20 him. Plaintiff is moody and will lose his temper and break things
21 or yell at his father or stepmother. He acts immature for his age
22 and has little or no impulse control. When he is angry at his
23 father, plaintiff plays video games at Ms. Parker's home. (AR
24 28)(citing Exhibit 22E which is AR 247-254). The ALJ cited the
25 statement from family friend Ginger Joy that plaintiff's behavior
26 worsened after his grandmother died. (AR 28)(citing Exhibit 12E
27 which is AR 195-196). The ALJ cited friend Donna Buck's statement
28 that plaintiff seemed depressed. He was nonresponsive to his

1 parents. Ms. Buck had not seen plaintiff when he was angry "but I
2 have seen what he has destroyed when his temper cuts loose." (AR
3 28)(citing Exhibit 23E which is AR 255-260).

4 The ALJ cited the statements of ValaRae VanCamp, plaintiff's
5 father's girlfriend, that plaintiff had temper problems. She
6 stated that, when angry, plaintiff would throw things like dishes,
7 slam stuff around, or make holes in the walls. (AR 28)(citing
8 Exhibits 7E and 31E which are AR 169-170 and AR 309-310). The ALJ
9 cited the statements of plaintiff's mother, Carol Briggs, that
10 plaintiff has a violent temper. She noted Ms. Briggs' statement
11 that many family members had temper problems and considered the
12 possibility that plaintiff's temper problems were hereditary. When
13 plaintiff was with Ms. Briggs, she had him take a multivitamin
14 with minerals and then "he's fine, happy, smiling and easy to get
15 along with." Ms. Briggs said Plaintiff liked to run around at
16 night. (AR 28)(citing Exhibit 9E, AR 175-176, and Exhibit 14E, AR
17 199-210).

18 The ALJ observed that plaintiff's father completed the
19 disability reports, work history reports, and reports of
20 activities of daily living on plaintiff's behalf. He also provided
21 a statement that plaintiff was suspended from junior high school
22 when he put hand lotion in a teacher's cup. When plaintiff was in
23 high school he told his teacher that the assigned book was stupid
24 and tossed a chair and a desk across the room. Plaintiff and a
25 female student were both suspended when plaintiff hit her in the
26 back of the head with a closed fist. Plaintiff threatens to damage
27 his friends' cars, but when they threaten to retaliate, "he quits
28 instantly." (AR 29)(citing Exhibit 32E which is AR 311-313).

1 The ALJ concluded that the testimony and lay witness
2 statements are consistent with other evidence. As noted, the lay
3 evidence confirms plaintiff's history of temper outbursts, usually
4 directed at his father and his father's girlfriend, and a history
5 of throwing and slamming things in the home and punching holes in
6 the walls of the home. (AR 29). Statements of nonfamily members
7 establish that his behavior with them is appropriate and
8 nonviolent. (AR 29). Dr. Bostwick diagnosed plaintiff with a mild
9 personality disorder with an intermittent explosive disorder, and
10 the ALJ accepted this diagnosis. (AR 27).

11 The ALJ may not ignore or improperly reject the probative
12 testimony of a lay witness without giving reasons that are germane
13 to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.
14 1993) (emphasis added). The ALJ shall "consider observations by
15 non-medical sources as to how an impairment affects a claimant's
16 ability to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.
17 1987), *citing* 20 C.F.R. § 404.1513(e)(2).

18 The ALJ explicitly discussed the lay testimony and credited
19 it when she found it consistent with other evidence. The ALJ did
20 not ignore or reject probative lay testimony. Accordingly, the ALJ
21 did not err with regard to the lay witnesses' testimony.

22 The ALJ evaluated the evidence of record, considered the
23 hearing testimony of plaintiff, his father, and the medical and
24 vocational experts, as well as the statements submitted by lay
25 witnesses, and concluded that plaintiff's mental impairments would
26 allow him to work at a limited range of unskilled jobs at or below
27 the medium level of exertion. (AR 30). The undersigned finds that
28 the evidence of record supports the ALJ's determination.

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this Court finds that the ALJ's decision that plaintiff is capable of performing a limited range of work at the medium level of exertion is supported by substantial evidence and free of legal error. Plaintiff is thus not disabled within the meaning of the Social Security Act. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 9) is **DENIED**.

2. Defendant's Motion for Summary Judgment (Ct. Rec. 12) is **GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** this file.

DATED this 28th day of December, 2006.

s/Michael W. Leavitt
MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE